

# LAW WATCH

A Legal Newsletter From Foley & Lardner

VOL. 03-29

DEC. 10, 2003

## CONGRESS ENACTS ANTI-SPAM LEGISLATION

On Dec. 8 the House passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act) (the "Act"), which had already been approved by the Senate.

President Bush is expected to sign the bill into law in the near future and the Act will become effective January 1, 2004. The Act regulates conduct related to "commercial e-mails" and provides both civil and criminal penalties for the violation of its provisions. The Act will also pre-empt, or trump, most state laws that regulate commercial e-mails.

The Act defines "commercial e-mails" as e-mails that have, as their primary purpose, the commercial advertisement or promotion of a commercial product or service, unless the e-mails are "transactional or relationship messages." "Transactional or relationship messages" are subject to differing standards in many cases, and these messages are emails related to certain topics, including employment relationships and benefits, the completion of commercial transactions, and account information.

The portions of the Act that impose criminal penalties largely relate to falsification of e-mail information. The Act first criminalizes hacking an innocent party's computer and sending spam from it. The Act also criminalizes the knowing falsification of e-mail header information, as well as the registry of five or more electronic e-mail addresses with false information if multi-

### **Executive Summary**

**Action:** *On December 8, 2003 Congress passed the CAN-SPAM Act of 2003 which places new restrictions on e-mails and pre-empts most state laws regulating e-mails.*

**Impact:** *Commercial e-mail must provide notice that it is an advertisement and provide recipients the ability to stop future commercial e-mails. The Act also contemplates the creation a national Do-Not-E-Mail registry.*

**Effective Date:** *January 1, 2004 if signed by President Bush as anticipated.*

ple e-mails are sent from the accounts. Penalties include prison terms of up to five years, fines, as well as forfeiture of profits gained by the conduct.

One of the provisions that will have the greatest effect on businesses is the requirement that commercial e-mails (but not transactional or relationship messages) include a functioning return e-mail address that is clearly and conspicuously displayed and permits a recipient to decline future commercial e-mails from that sender. A sender also has the option of providing an Internet or other menu-based system that permits a recipient to choose which e-mails he or she wishes to receive, as long as a recipient can decline all

e-mails. The sender, as well as those acting on behalf of the sender, must stop sending e-mails within 10 business days of the receipt of a request to cease and desist future commercial e-mails. Moreover, the sender of commercial e-mails, as well as any other person who knows of the request, must not sell, lease, exchange or otherwise transfer the recipient's e-mail address for any purpose other than compliance with the law. In other words, once a sender has received a notice to stop commercial e-mails, that e-mail address essentially cannot be sold or provided to any other person or entity.

Senders of commercial e-mails must also now include: (1) clear and conspicuous identification that the e-mail is an advertisement; (2) clear and conspicuous notice of the ability to refuse to receive future e-mails; and (3) a valid postal address.

The Act also regulates companies whose products or services are promoted in improper e-mails, even when the company is not a sender of a commercial e-mail. This can occur if the company knows, or should have known, (1) that its products or services are being promoted in a commercial e-mail, (2) it received or expected to receive economic benefit, and (3) it took no reasonable action to prevent the transmission or to detect the transmission and report it to the FTC.

An examination of the civil enforcement provisions of the Act presents some surprises. One of the most interesting aspects of the Act is that it

does not provide affected recipients a private right of action. Thus, under the terms of the Act itself, a recipient does not have the right to sue a spammer. It should be noted in California that violation of the Act would likely be considered an "unlawful business practice" that could give rise to a claim under California's Unfair Competition Law, which permits plaintiffs to seek redress for violations of law even where no private right of action otherwise exists.

The list of entities permitted to enforce the Act is also noteworthy. While the Act contemplates civil enforcement by the FTC and FCC, other federal and state agencies, as well as state attorney generals have been granted the ability to enforce the Act. These other agencies include: the Comptroller of the Currency; the Federal Reserve Board; the Board of directors of the FDIC; the Director of the Office of Thrift Supervision; the SEC; and state insurance departments.

The civil remedies granted by the Act include injunctive relief, which is available without proof of intent. Thus, even where the Act itself requires intent to establish a violation, these governmental agencies need not establish intent and senders face strict liability for injunctive relief. Civil damages are also available for violations of the Act. Monetary damages can also be sought, if it is shown that the sender acted intentionally, or negligently. Each violation in an action brought by a state can give rise to a penalty of \$250 per email, up to a total of \$2,000,000. Damages can be trebled if there is a showing of willfulness or intent. Damages can also be reduced if there is a showing that the sender implemented commercially reasonable practices to prevent violations. A court can also, in its discretion, award attorneys' fees.

While Congress did not recognize recipients' right to sue, it did grant Internet Service Providers (ISPs) the right to bring actions against spammers. ISPs are authorized to bring actions in federal court seeking injunc-

tions and monetary damages as a result of violations of the Act. Statutory damages, as well as attorneys' fees are also available to ISPs.

Following the Do-Not-Call Registry model, the FTC is required within six months to create a plan and a timetable for the establishment of a nationwide Do-Not-Email registry. Issues the FTC is to consider include how to address children's email accounts, as well as security and privacy issues. This plan can be implemented by the FTC not earlier than 9 months after the enactment of the Act.

If you would like a copy of the CAN-SPAM Act or have any further questions, please contact **Andrew Serwin** in our San Diego South office, **Kevin Egan** or **Fred Entin** in our Chicago office, **Jim Kalyvas** or **Mike Overly** in our Los Angeles office, **Fritz Vorlop** in our Milwaukee office, **Scott Kizer** in our Orlando office, or the member of the firm who normally handles your legal matters.

*This article was originally published in the Daily Transcript.*

---

**This *Law Watch* was authored by Andrew Serwin of our San Diego South office. *Law Watch* is a review of recent legal developments prepared by Foley & Lardner. The information reported should not be construed as legal advice, nor utilized to resolve legal problems. Recent issues of *Law Watch* are also available on our web site at:**

[www.foley.com](http://www.foley.com)

**Check out *Publications*, click on *Newsletters* and see *Recent Newsletters*. You may wish to bookmark this page and refer to it frequently.**

**You may also subscribe to *Law Watch* and have it delivered electronically to your e-mail address by visiting our website. To advise us of an address correction, please call (800) 400-7757.**

**Editor: Clare Richardson.**

**©2003 Foley & Lardner. Reproduction with attribution permitted.**

#### **Brussels**

Avenue Lloyd George 6, Box 3  
Brussels, Belgium B-1000  
011-32-2-639-2710

#### **Chicago**

321 North Clark St., Suite 2800  
Chicago, IL 60610-4764  
(312) 832-4500

#### **Denver**

1999 Broadway, Suite 2270  
Denver, CO 80202-5722  
(303) 294-4400

#### **Detroit**

150 W. Jefferson Ave., Suite 1000  
Detroit, MI 48226-4443  
(313) 963-6200

#### **Jacksonville**

The Greenleaf Building  
200 Laura Street  
Jacksonville, FL 32202-3510  
(904) 359-2000

#### **Los Angeles**

2029 Century Park East, Suite 3500  
Los Angeles, CA 90067-3021  
(310) 277-2223

#### **Madison**

Verex Plaza  
150 East Gilman Street  
Madison, WI 53703-1481  
(608) 257-5035

#### **Milwaukee**

777 East Wisconsin Ave., Suite 3800  
Milwaukee, WI 53202-5306  
(414) 271-2400

#### **Orlando**

111 North Orange Ave., Suite 1800  
Orlando, FL 32801-2386  
(407) 423-7656

#### **Sacramento**

300 Capitol Mall, Suite 1125  
Sacramento, CA 95814-4339  
(916) 443-8005

#### **San Diego**

402 West Broadway, Suite 2300  
San Diego, CA 92101-3542  
(619) 234-6655  
11250 El Camino Real, Suite 200  
San Diego, CA 92130  
(858) 847-6700

#### **San Francisco**

One Maritime Plaza, Sixth Floor  
San Francisco, CA 94111-3409  
(415) 434-4484

#### **Tallahassee**

106 East College Ave., Suite 900  
Tallahassee, FL 32301-7732  
(850) 222-6100

#### **Tampa**

100 North Tampa Street, Suite 2700  
Tampa, FL 33602-5810  
(813) 229-2300

#### **Tokyo**

JT Building 15F  
2-2-1 Toranomon Minato-ku  
Tokyo 105-0001 Japan  
(011) 81 (03) 5114-8320

#### **Washington, D.C.**

Washington Harbour  
3000 K Street, N.W., Suite 500  
Washington, D.C. 20007-5101  
(202) 672-5300

#### **West Palm Beach**

Phillips Point - 901 West Tower  
777 South Flagler Dr.  
West Palm Beach, FL 33401-6195  
(561) 655-5050